

STATE OF MICHIGAN
COURT OF APPEALS

PAUL DON-VICTOR ARTEAGA,

Plaintiff-Appellant,

v

ASHLEY NICHOLE HUGHES,

Defendant-Appellee.

UNPUBLISHED

May 27, 2014

No. 318882

Genesee Circuit Court

Family Division

LC No. 09-289167-DP

Before: CAVANAGH, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the order denying his motion for sole legal and sole physical custody and granting defendant's request for sole legal and sole physical custody. We affirm.

I. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Plaintiff argues that the trial court erred in finding that defendant established proper cause or a change of circumstances existed. We disagree.

"All orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). Specifically, a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances is reviewed under the great weight of the evidence standard. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009).

"Before modifying or amending a custody order, the circuit court must determine whether the moving party has demonstrated either proper cause or a change of circumstances to warrant reconsideration of the custody decision." *Dailey v Kloenhamer*, 291 Mich App 660, 665; 811 NW2d 501 (2011), citing MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). The moving party has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists. *Id.* at 509.

To establish proper cause, there must be appropriate grounds that have or could have a significant effect on the child's well-being such that reevaluation of custody should be made. *Id.*

at 511. The ground or grounds establishing proper cause “should be relevant to at least one of the twelve statutory best interest factors[.]” *Id.* at 512.

To establish a change of circumstances, the moving party must prove that “since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child’s well-being, have materially changed.” *Id.* at 513. (Emphasis in original.) “[N]ot just any change will suffice, for over time there will always be some changes in a child’s environment, behavior, and well-being.” *Id.* “Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child.” *Id.* at 513-514.

Plaintiff argues that the trial court erred in finding that there was proper cause or a change of circumstances. We disagree. Plaintiff alleged that defendant’s husband, Cody Stutler (Cody), inappropriately touched the child’s genitals, Cody and defendant abused the child, and that defendant neglected the child. These allegations were not substantiated by the evidence presented at the hearing. As the trial court found, the evidence established that CPS investigated the allegations and concluded that there was not a preponderance of the evidence of any child abuse or neglect involving the child. Plaintiff admitted that there was no medical proof to corroborate the alleged sexual abuse. Cody also passed a polygraph examination during which time he denied any sexual abuse of the child. The criminal investigation of Cody was completed without charges being filed.

Moreover, a CPS worker testified that plaintiff was not cooperative throughout CPS’s investigation. The CPS worker had concerns that plaintiff possibly coached the child. Plaintiff discussed the allegations with the child. Specifically, there was an instance where the child entered plaintiff’s bathroom while he was urinating. Plaintiff then asked the child if Cody had “touched her with what daddy was peeing with.” Plaintiff confirmed this incident during his testimony at trial. Before this incident, the CPS worker had specifically instructed plaintiff not to discuss the allegations with the child. When asked to rate plaintiff’s ability to coparent on a scale of 1 to 10, with 10 being very good and one being very bad, the CPS worker testified that it would be a “one or two.”

Defendant also obtained a personal protection order against plaintiff on March 20, 2012. The parties were ordered to engage in drug testing during the pendency of this action. Plaintiff tested positive for THC and defendant’s results were negative. Despite the direction of CPS and court orders, plaintiff failed to return the child to defendant on more than one occasion. The trial court subsequently ordered defendant be awarded makeup parenting time. On September 27, 2012, the trial court also removed restrictions regarding Cody’s contact with the child.

Furthermore, the trial court found defendant to be credible, but “frequently doubted Plaintiff’s credibility, motives and decision making capacity.” “[T]his Court must defer to the trial court on issues of credibility.” *Gagnon v Glowacki*, 295 Mich App 557, 568; 815 NW2d 141 (2012). The trial court also found that there was “tremendous animosity between the parties” and that the parties did not communicate. Given the unsubstantiated sexual abuse allegations, the animosity between the parties, and the lack of communication, there were appropriate grounds that have or could have a significant effect on the child’s well-being such

that reevaluation of custody should be made. See *Vodvarka*, 259 Mich at 511. In addition, defendant established that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. See *id.* at 513. Therefore, the trial court properly determined that proper cause or a change of circumstances existed to revisit custody.

II. BEST INTERESTS

Plaintiff argues that the trial court abused its discretion in modifying custody because defendant failed to present clear and convincing evidence that modification was in the child's best interests. We disagree.

"All orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." *Pierron*, 486 Mich at 85, citing MCL 722.28. "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

"Once the trial court determines there is proper cause or a change of circumstances to permit the matter to be revisited, the trial court still may not modify custody from an established custodial environment unless there is clear and convincing evidence that a modification is in the best interest of the child. MCL 722.27(1)(c)." *Mitchell v Mitchell*, 296 Mich App 513, 520; 823 NW2d 153 (2012). "Thus, if the trial court determines that an established custodial environment exists, the moving party has the burden of proving by clear and convincing evidence that the proposed modification is in the best interests of the children." *Id.* "In determining whether the moving party has satisfied this burden, the trial court must consider all the statutory best-interest factors set out in MCL 722.23." *Id.* Here, the trial court determined that an established custodial environment exists with both parents. Therefore, defendant had the burden of proving by clear and convincing evidence that the modification of the existing custody order was in the child's best interests.

The trial court analyzed each best interest factor and found that factors (b), (c), (d), (e), (f), (g), (h), (j), and (k) favored defendant. The trial court found that factor (a) was weighted equally between the parties. The trial court did not state which party factor (i) favored, but noted that the parties agreed that the child was too young to express a preference. On appeal, plaintiff disputes the trial court's findings that factors (b), (c), (d), (e), (f), (g), (h), (j), and (k) favored defendant.

FACTOR (b)

Factor (b) involves "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). The trial court found that the parties were each capable of giving the child love and affection. The trial court disbelieved plaintiff's assertions that defendant inappropriately disciplined the child. The trial court also found that plaintiff failed a drug test during the pendency of this matter and that he had been "convicted of crimes

regarding his veracity both of which put into question Plaintiff's capacity to provide the child with appropriate guidance." Lastly, the trial court found that defendant had enrolled the child in school and had the capacity to provide the child with guidance and to continue the education of the child.

Plaintiff maintains that the trial court improperly considered his 2005 conviction of fourth-degree money laundering under this factor because the trial court could not consider evidence before entry of the last custody order in 2010. We disagree. In *Vodvarka*, 259 Mich App at 501, this Court held that, "in determining if a change of circumstances had occurred, the trial court was limited to basing its decision on events occurring after entry of the most recent custody order." However, this Court explicitly stated that this limitation was applicable only to the issues of whether there was a change of circumstances or proper cause. *Id.* at 514-515. Thus, the determination of the best-interest factors is based on all evidence in the record and is not time limited to actions occurring since the entry to the last custody order. *Id.* Therefore, the trial court was permitted to consider defendant's 2005 conviction.

Moreover, the evidence supports the trial court's findings that defendant did not inappropriately discipline the child and that plaintiff failed a drug test during the pendency of this matter. In addition, defendant enrolled the child in school and testified that she cared for the child's education. Therefore, the evidence did not clearly preponderate in the opposite direction of the trial court's findings. See *Berger*, 277 Mich App at 705.

FACTOR (c)

Factor (c) involves "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." The trial court found that neither party was employed, plaintiff received government assistance and inherited United States savings bonds of an uncertain amount that was entirely controlled at the discretion of his grandmother, and defendant lived with her employed husband. The trial court further found that defendant voluntarily placed the child with plaintiff to ensure the child's medical safety when defendant was diagnosed with methicillin-resistant staphylococcus aureus (MRSA). The trial court also stated it was "persuaded that Plaintiff either fabricated the sexual abuse allegations and/or made inappropriate decisions in response to the disclosure made by the child that led to the minor child being subjected to a middle of the night physical sexual assault examination and subsequent forensic interviews."

Plaintiff primarily contests the trial court's consideration of the sexual abuse allegations in determining that factor (c) favored defendant. We disagree. The trial court made a credibility determination and properly found that the sexual abuse allegations, which resulted in the physical sexual assault examination of the child and forensic interviews, negatively affected plaintiff's ability to provide the child with medical care and other remedial care. "[T]his Court must defer to the trial court on issues of credibility." *Gagnon*, 295 Mich App at 568.

Plaintiff also argues that the trial court improperly considered the parties' ability to provide financial support and that the trial court's "focus on factor (c) [was] simply whether the parties can provide financially for the minor child." Contrary to plaintiff's assertion, the parties'

ability to provide financial support for the child has a direct impact on one's ability to provide the child with food, clothing, medical care, and other remedial care. Moreover, the trial court considered evidence other than the parties' ability to provide financial support under this factor. Specifically, the trial court considered the negative impact of plaintiff's fabrication or inappropriate decisions regarding the sexual abuse allegations in addressing plaintiff's capacity to provide the child with medical care and other remedial care. In addition, the evidence established that defendant's husband was employed and that she voluntarily placed the child with plaintiff to ensure the child's medical safety when defendant was diagnosed with MRSA. Although defendant lived in several homes during the preceding years before she was married to Cody, she testified that she moved to Morrice in September 2012 and lived in a home where the child had her own bedroom. Therefore, the evidence did not clearly preponderate in the opposite direction of the trial court's findings. See *Berger*, 277 Mich App at 705.

FACTOR (d)

Factor (d) involves "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The trial court found that plaintiff owned a home and that he and his live-in girlfriend had separated by the time of trial. On the other hand, defendant was married and lived in a home with her husband. Plaintiff argues this factor did not favor defendant because she lived a transient lifestyle. However, as the trial court found, defendant married in September 2012 and lived in a stable home with her husband. Accordingly, the evidence did not clearly preponderate in the opposite direction of the trial court's findings. See *Berger*, 277 Mich App at 705.

FACTOR (e)

Factor (e) involves "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." The trial court found that plaintiff owned a home and "indicated in his pleadings that he lived in his house with the minor child and his [girlfriend]." The trial court also found that plaintiff testified that he and his girlfriend had separated. Given that defendant was married and maintained a residence with her husband, the trial court found that this factor favored defendant.

Plaintiff contends that the trial court erred by "focusing too much on the minor child's physical home, which relates to factor (d), instead of the continuity of his family unit." Contrary to plaintiff's assertions, the trial court properly addressed the permanence of the parties' custodial homes in evaluating this factor. The trial court found that defendant was married and had lived in a home with her husband since September 2012. On the other hand, plaintiff had lived with his girlfriend, but the two had separated by the time of trial. Therefore, the evidence did not clearly preponderate in the opposite direction of the trial court's findings. See *Berger*, 277 Mich App at 705.

FACTOR (f)

Factor (f) involves "[t]he moral fitness of the parties involved." The trial court found that this factor strongly favored defendant because plaintiff's allegations against defendant and Cody were not substantiated by CPS. The trial court determined that, "[a]t best, Plaintiff reacted in a

rash manner after the allegations that Defendant's husband inappropriately touched the very young minor child by taking the minor child from county to county to obtain a physical abuse exam between 1:00 a.m. and 4:00 a.m. without consulting Defendant in any way. At worst, Plaintiff fabricated the entire CSC allegation against Defendant's husband." The trial court also found that plaintiff had been convicted in 2005 of a crime involving lack of truthfulness and that the issue of plaintiff's truthfulness had arisen throughout the investigation and proceedings. The trial court further found that plaintiff's willingness to use the child for his own purposes, i.e., to gain advantage in court proceedings to keep the child from defendant, had impacted the child.

Plaintiff contends that the trial court improperly considered the CPS investigation and his 2005 conviction for fourth-degree money laundering. The trial court determined that the alleged sexual abuse, which was either fabricated or improperly handled by plaintiff, negatively affected plaintiff's moral fitness. As noted above, the trial court was permitted to consider the CPS investigation and defendant's 2005 conviction. See *Vodvarka*, 259 Mich App at 514-515. Accordingly, the evidence did not clearly preponderate in the opposite direction of the trial court's findings. See *Berger*, 277 Mich App at 705.

FACTOR (g)

Factor (g) involves "[t]he mental and physical health of the parties involved." The trial court found that plaintiff was, at one time, diagnosed with bipolar disorder and was prescribed medication. The trial court also found that plaintiff "made assertions about Defendant which were not proven at trial."

Plaintiff argues that the trial court erred in considering evidence of his bipolar disorder because he was diagnosed before the entry of the last custody order. However, the trial court was permitted to consider evidence that existed before entry of the last custody order. See *Vodvarka*, 259 Mich App at 514-515. Plaintiff also argues that the trial court erred because it did not consider Doctor Harold Sommerschild's testimony and his opinion that plaintiff did not have bipolar disorder. However, plaintiff's argument relates to questions of credibility and weight of the evidence. This Court will not substitute its judgment for that of the trial court. *McIntosh v McIntosh*, 282 Mich App 471, 478; 768 NW2d 325 (2009). Likewise, "this Court must defer to the trial court on issues of credibility." *Gagnon*, 295 Mich App at 568. Therefore, the evidence did not clearly preponderate in the opposite direction of the trial court's findings. See *Berger*, 277 Mich App at 705.

FACTOR (h)

Factor (h) involves "[t]he home, school, and community record of the child." The trial court found this factor favored defendant because she enrolled the child in school close to her home and plaintiff admitted the school appeared "appropriate and nice." Plaintiff argues that the trial court improperly considered defendant's action of enrolling the child in school as a positive for defendant because she made the unilateral decision to do so without consulting him. We agree with plaintiff. Although plaintiff, but not defendant, testified that defendant enrolled the child in school without consulting plaintiff, the fact remains that this dispute does not relate to the home, school, and community record of the child. Therefore, the evidence clearly

preponderates in the opposite direction of the trial court's findings. See *Berger*, 277 Mich App at 705.

FACTOR (j)

Factor (j) involves "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." The trial court found that this factor strongly favored defendant because plaintiff refused to return the minor child to defendant despite being directed by CPS and police officers to remain in compliance with the CPS safety plan and court orders. In addition, the evidence suggested that the "CPS allegations may have either been entirely fabricated or at least manipulated by Plaintiff to take the minor child from Defendant as a means of punishing her for her relationship with her now husband." The trial court also found that, for the most part, defendant had complied with court orders.

Plaintiff maintains that the trial court's finding that this factor favored defendant was against the great weight of the evidence because defendant was awarded parenting time when plaintiff withheld parenting time, and defendant testified that she did not want plaintiff to have parenting time when asked directly by the trial court regarding this issue. We disagree with plaintiff. The record evidence established that at no time did CPS or the court restrict defendant's parenting time. Plaintiff was aware that there was a safety plan in place with defendant. The CPS worker informed plaintiff that defendant was entitled to regular parenting time. Despite this, plaintiff failed to return the child to defendant on multiple occasions. As a result, the trial court entered an order awarding defendant 11 days of makeup parenting time in addition to her regularly scheduled parenting time.

The CPS worker testified that she had numerous concerns throughout her investigation that plaintiff possibly coached the child. Plaintiff accused defendant of placing a recording device in the child's doll, but presented no evidence to substantiate this claim. Ultimately, CPS concluded that there was not a preponderance of evidence of any child abuse or neglect involving the child, and the trial court determined that plaintiff either fabricated the allegations or manipulated the allegations. Defendant testified that she did not want the court to order any parenting time for plaintiff, stating, "I know that sounds hard but I just feel like it's not good for her to be around him. He continues -- he tells her stuff about the courts and all of the stuff that we're going through. He . . . [tells her] you don't have to see your mom anymore if you don't want to[.]" Defendant believed that plaintiff genuinely cared for the child, but that he was not mentally stable enough to make parental decisions. Accordingly, the evidence did not clearly preponderate in the opposite direction of the trial court's findings. See *Berger*, 277 Mich App at 705.

FACTOR (k)

Factor (k) involves "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." The trial court found that this factor favored defendant because she had obtained a personal protection order against plaintiff. Plaintiff maintains the trial court's finding was against the great weight of the evidence because "there was absolutely no testimony of domestic violence by either party." However, the record evidence established

that defendant obtained a personal protection order against plaintiff on March 20, 2012, in Shiawassee County, and alleged that plaintiff was stalking defendant. A copy of the personal protection order was admitted into evidence. Therefore, the evidence did not clearly preponderate in the opposite direction of the trial court's findings. See *Berger*, 277 Mich App at 705.

CHANGE OF CUSTODY

The trial court did not abuse its discretion in modifying custody and awarding defendant sole legal and sole physical custody of the child. Although the evidence regarding factor (h) clearly preponderated in the opposite direction of the trial court's finding, "the trial court has discretion to accord differing weight to the best-interest factors." *Id.* Accordingly, we affirm the trial court's order granting defendant sole legal and sole physical custody.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Michael J. Kelly